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IN THE

Supreme Court of the United States

Commonwealth of Virginia,
Petitioner,

v.

David Lee Moore.

On Petition for a Writ of Certiorari
to the Supreme Court of Virginia

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Amendment permits the police to seize and search a person incident to an arrest for a state law offense when the relevant state law permits only the issuance of a citation and prohibits the arrest.

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STATEMENT OF THE CASE

Under Virginia law, driving with a suspended license is a Class 1 misdemeanor. Va. Code § 46.2-301(C). State law further provides, with exceptions not applicable here, that an arrest is not permitted for such an offense. Rather, the officer "shall . . . issue a summons . . . to appear at a time and place to be specified in such summons . . . . [U]pon the giving by such person of his written promise to appear at such time and place, the officer shall forthwith release him from custody." *Id.* § 19.2-74(A)(1).

On February 20, 2003, two city police detectives detained respondent David Lee Moore for driving with a suspended license. Notwithstanding the fact that Virginia law forbids officers from arresting motorists for this conduct, the detectives who stopped Moore decided to make a full custodial arrest rather than issue him a summons or citation. The officers later conceded that they had no reason to make an arrest rather than issue the summons required by law, and the State did not attempt to establish that the officers had made an innocent mistake. Rather, when asked why they did not issue a summons, one of the detectives answered that it was "[j]ust our prerogative. We chose to effect an arrest." Pet. App. 2, n.2.

The two detectives illegally handcuffed Moore, placed him in a police vehicle, and took him to another location. Over an hour later, they conducted a full search of Moore's person and found cocaine in his pocket. *Id.* at 2, 14.

The state charged Moore with possession with intent to distribute cocaine. Respondent moved to suppress the fruits of the search under the Fourth Amendment. *Id.* at 37. The trial court denied the motion, reasoning that the Constitution does not require suppression when an officer arrests a suspect for a misdemeanor committed in his presence and conducts a

search incident to that arrest. *Id.* In a bench trial, Moore was convicted and sentenced to five years imprisonment. *Id.*

A panel of the Court of Appeals of Virginia reversed, holding that the search was unconstitutional under this Court's decision in *Knowles v. Iowa*, 525 U.S. 113 (1998). *See* Pet. App. 42-44. In *Knowles*, this Court unanimously held that the search incident to arrest exception to the warrant requirement does not extend to cases in which officers do not arrest the suspect, but only issue a citation. *Id.* The Court of Appeals in this case reasoned that the search incident to arrest exception similarly did not apply to a search conducted incident to an illegal arrest for a citation-only offense:

> [I]n light of the Supreme Court's declaration in *Knowles* that the Fourth Amendment does not permit a search incident to issuance of a citation, we now conclude that a search conducted pursuant to a custodial arrest that violates Code § 19.2-74 constitutes, in effect, a search incident to issuance of a citation in violation of the Fourth Amendment. *Knowles* holds that if an officer, exercising his discretion, chooses only to issue a citation rather than to effect a full arrest, a search incident to the issuance of that citation is unconstitutional. We see no reason to reach a different result when it is the legislature that has concluded that, absent additional facts, only a citation should be issued for a particular offense.

Id. at 43-44 (footnote omitted).

On rehearing *en banc*, the full Court of Appeals in turn reversed and reinstated the conviction by a divided vote. *Id.* at 13, 27. The majority conceded that state law forbade arresting Moore simply for driving with a suspended license, but nonetheless held that neither the arrest nor the subsequent search violated the Fourth Amendment. The majority

reasoned that an arrest based on "probable cause" is not unconstitutional even when the jurisdiction whose law the police believes the suspect has broken does not allow arrests for violations of that law. *Id.* at 21-22. The majority further concluded that, even when an arrest violates state law in this manner, a search incident to arrest does not violate the Fourth Amendment. *Id.* at 22-24.

Moore appealed to the Supreme Court of Virginia, which unanimously reversed and held that the Fourth Amendment required suppression. The court rejected petitioner's assertion that the search of respondent's person was constitutional because it was conducted incident to an arrest supported by probable cause. *Id.* at 6-7. That argument, the court explained, rested on the incorrect premise that the Fourth Amendment permits a warrantless search of an individual whenever an officer chooses to arrest him, even if state law forbids the officer from conducting an arrest for that particular offense. *Id.*

The court thus acknowledged that under *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), if "an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." Pet. App. 7 (quoting *Atwater*, 532 U.S. at 354). But the court concluded that *Atwater* provided "little support for the Commonwealth's position in this case" because "*Atwater* only involved the legality of an *arrest*; it did not involve any question about a *search* incident to arrest." *Id.* (emphasis added). Those questions, the court recognized, are quite distinct.

The court explained that the Fourth Amendment generally prohibits warrantless searches, subject to limited exceptions including "a search incident to arrest exception . . . which allows a full field-type search of the person incident to

a lawful custodial arrest." *Id.* at 5. The court further recognized, however, that this exception does not extend to every case in which officers have probable cause to believe that an individual has violated the law. To the contrary, this Court's decision in *Knowles* established "that the Fourth Amendment forbids expansion of the search incident to arrest exception to include a search incident to citation." *Id.* at 6. The court rejected petitioner's attempt to distinguish *Knowles* on the ground that "the defendant there was not arrested," whereas respondent in this case was actually, if unlawfully, arrested. *Id.* Reaffirming its prior decision in *Lovelace v. Commonwealth*, 522 S.E.2d 856 (Va. 1999), the court rejected that distinction. *See* Pet. App. 10. "Thus, under the holding in *Knowles*, the officers could not lawfully conduct a full field-type search." *Id* at 11.

REASONS FOR DENYING THE WRIT

The Fourth Amendment's protection against "unreasonable searches and seizures" (U.S. Const. amend. IV) embodies the foundational principle that – absent the application of a special exception – individuals will not be seized and searched without a warrant issued upon probable cause. This Court has recognized certain narrow exceptions to the warrant requirement, including an exception for a search incident to a *lawful* arrest. *See, e.g., United States v. Robinson*, 414 U.S. 218, 224 (1973). In *Knowles*, 525 U.S. at 144, this Court refused to extend that exception to cases in which an officer conducts a search incident to issuing a citation. In the present case, the Virginia Supreme Court considered the constitutionality of a search incident to an arrest for driving with a suspended license – an offense for which state law permits issuance of a citation, but in these circumstances forbids arrest. Relying on *Knowles*, the court refused to extend the exception to a case in which the suspect

had committed an offense for which a citation was the only legally permissible response, but the officer nonetheless illegally arrested the defendant. Pet. App. 11.

Petitioner asserts that the ruling below conflicts with the decisions of federal courts of appeals, state supreme courts, and the teachings of this Court. That claim is unsupported. There is no conflict of authority on the question decided in this case: whether, after *Knowles*, the Fourth Amendment permits a warrantless search incident to an arrest for an offense to which state officers may only respond by issuing a citation. Moreover, the Virginia Supreme Court's decision is correct and compelled by this Court's Fourth Amendment jurisprudence, which recognizes that it is fundamentally unreasonable for an officer to search or seize a person based on nothing more than probable cause to believe that the suspect has committed an offense that the state has determined is insufficiently serious to justify the substantial intrusion upon individual freedom that results from an arrest.

I. The Decision Below Does Not Create A Certworthy Conflict Among The Lower Courts.

The decision below rests on a narrow holding of constitutional law. Relying on this Court's decision in *Knowles*, the Virginia Supreme Court held that the search incident to arrest exception to the Fourth Amendment's warrant requirement does not extend to cases in which officers unlawfully arrest a suspect for conduct that permits only a citation. Petitioner's assertion of a split of authority is twice misplaced, relying first on cases considering the constitutionality of *arrests* rather than of *searches*, and second on cases that do not involve searches incident to arrests for *citation-only* offenses, which were the only kinds of searches addressed by the decision in this case. Moreover, even if there were a division of authority on the question

presented, the issue would not be sufficiently recurring or important to warrant this Court's review at this time.

1. It is common ground that when the police arrest a suspect in violation of the Fourth Amendment, any evidence obtained as a result ordinarily must be suppressed as the fruit of that unconstitutional arrest. *See, e.g., Brown v. Illinois*, 422 U.S. 590, 602-03 (1975); *Wong Sun v. United States*, 371 U.S. 471, 485 (1963). Attempting to take advantage of that rule, defendants have sometimes argued that an *arrest* in violation of state law was also an *arrest* in violation of the Fourth Amendment and that, therefore, any evidence obtained in a subsequent search must be suppressed as the fruit of an unconstitutional arrest. Petitioner cites a number of cases rejecting this argument on the ground that an arrest in violation of state law does not necessarily constitute an unreasonable *seizure* in violation of the Fourth Amendment. *See* Pet. 9-11. These cases have concluded that the Fourth Amendment permits an arrest based on probable cause to believe the suspect has committed a criminal violation of state law, even if state law would not permit the arrest for some reason or another. *See, e.g., United States v. Van Metre*, 150 F.3d 339, 346-47 (4th Cir. 1998); *United States v. Walker*, 960 F.2d 409, 416 (5th Cir.1992); *United States v. Miller*, 452 F.2d 731, 733-74 (10th Cir. 1971).

Those decisions have nothing to do with the holding in this case. The Virginia Supreme Court did not suppress the evidence in this case as the fruit of an unconstitutional *arrest*. Indeed, the court expressed no view as to whether respondent's arrest was in violation of the Fourth Amendment. Instead, the court held that even if the arrest were constitutional (as the citation was in *Knowles*), the incident search was not. The court explained that the Fourth Amendment generally prohibits warrantless searches of individuals, subject to the limited search incident to arrest

exception. Pet. App. 5. The question in this case was whether that exception applies when the defendant was arrested for an offense that, under state law, is subject only to citation and release. *Id.* at 6, 7. As the Fourth Circuit has explained, there is "a difference between using state law to determine the constitutionality of an arrest" on the one hand, and "using it to evaluate an arrest for the purposes of the incident search doctrine," on the other. *Street v. Surdyka*, 492 F.2d 368, 372 n.7 (4th Cir. 1974). In "the latter instance, the state seeks to validate an otherwise unconstitutional search by tying it to a valid arrest. It may be that an arrest, though constitutional under federal standards, cannot serve as the basis for an incident search if it is illegal under state law." *Id.* Although the Fourth Circuit had no occasion to definitely resolve that question in *Surdyka*, *see id.*, that was the only question posed by this case and answered by the Virginia Supreme Court in its decision below.

That is not, however, the question addressed in the cases petitioner asserts to be in conflict with the opinion in this case. Instead, petitioner's cases uniformly consider only the distinct question of whether an *arrest* in violation of state law is unconstitutional, without ever separately considering the scope of the search incident to arrest exception or the possibility that the search might be unconstitutional even if the arrest is not. In fact, in nine of the fifteen cases cited as part of the split, there either was no search conducted or the search was not challenged.[1] For example, in *United States v.*

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[1] **1st Cir.**: *Vargas-Badillo v. Diaz-Torres*, 114 F.3d 3, 6 (1st Cir. 1997) (no search; section 1983 suit claimed only unconstitutional arrest);

3d Cir.: *Anderson v. Haas*, 341 F.2d 497, 498 (3d Cir. 1965) (same);

4th Cir.: *United States v. Van Metre*, 150 F.3d 339, 346-47 (4th Cir. 1998) (search not challenged);

Van Metre, 150 F.3d 339 (4th Cir. 1998), the defendant moved to suppress a confession he gave after an allegedly unconstitutional arrest in his hotel room. Although the room was searched after the arrest, the defendant did not contest the constitutionality of the search and made no attempt to suppress the evidence found in the room (a "single marijuana cigarette" having no relevance to his kidnapping charge, *id.* at 344). Instead, he contended that "his confessions and the evidence obtained as a direct result thereof should have been suppressed because they were fruits of an illegal arrest." *Id.* at 346. The Fourth Circuit thus had no occasion to decide the scope of the search incident to arrest exception.[2]

Even in the cases involving a search incident to arrest, the courts did not confront the argument accepted by the Virginia Supreme Court in this case: namely that an arrest in violation of state law, while not unconstitutional in itself, does not provide a basis for invoking the search incident to

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7th Cir.: *Gordon v. Degelmann*, 29 F.3d 295, 301 (7th Cir. 1994) (Section 1983 suit claiming only unconstitutional arrest);

11th Cir.: *Knight v. Jacobson*, 300 F.3d 1272, 1274 (11th Cir. 2002) (same);

Massachusetts: *Commonwealth v. Lyons*, 492 N.E.2d 1142, 1144 (Mass. 1986) (no search);

Michigan: *People v. Hamilton*, 638 N.W.2d 92, 94 (Mich. 2002) (same);

North Carolina: *State v. Eubanks*, 196 S.E.2d 706, 707 (N.C. 1973) (same);

Ohio: *State v. Droste*, 697 N.E.2d 620, 621 (Ohio 1998) (same).

[2] Accordingly, petitioner's assertion (Pet. 13) of an untenable conflict between the state and federal courts of Virginia is unfounded. As noted above, the Fourth Circuit itself has long recognized that an arrest may be constitutional while the search incident to that arrest may be barred by the Fourth Amendment for precisely the reasons given by the Virginia Supreme Court in this case. *See Surdyka*, 492 F.2d at 372 n.7.

arrest exception.[3] For example, in *People v. McKay*, 41 P.3d 59, 63 (Cal. 2002), the defendant argued solely that drugs found in a search incident to his arrest for a traffic infraction should be suppressed because his *arrest* was unconstitutional. *See id.* at 63 (defendant argued that drugs should be suppressed because "a custodial arrest for a fine-only offense ... violates the Fourth Amendment," and, in the alternative, because "his custodial arrest . . . violated the federal Constitution by the deputy's failure to comply with . . . the state statute that governs the arrest procedure for this infraction"). There is no indication that the defendant argued that the evidence should be suppressed even if the arrest was constitutional, on the ground that the search incident to arrest doctrine would not extend to his case. Accordingly, the California Supreme Court considered only whether the "defendant's arrest, notwithstanding its constitutionality under *Atwater*, became unconstitutional because it assertedly was not authorized" under state law. *Id.* at 64. And the court ultimately decided only that "so long as the officer has

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[3] **5th Cir.**: *United States v. Walker*, 960 F.2d 409, 415 (5th Cir. 1992) (unclear whether search challenged, but search was not, in any event, separately analyzed);

6th Cir.: *United States v. Wright*, 16 F.3d 1429, 1433-37 (6th Cir. 1994) (assuming without analysis that there is no distinction between the relevance of state law to the constitutionality of the arrest as opposed to the constitutionality of the search);

10th Cir.: *United States v. Miller*, 452 F.2d 731, 732 (10th Cir. 1971) (evaluating only the defendant's "sole contention ... that [his] *arrest* was illegal and that the sawed-off shotgun obtained as a result thereof is not admissible against him.") (emphasis added); *see also id.* (evidence was, in any event, in plain view of arresting officer);

California: *People v. McKay*, 41 P.3d 59, 64-72 (Cal. 2002) (not analyzing search incident to arrest exception);

Colorado: *People v. Hamilton*, 666 P.2d 152, 732 (Colo. 1983) (*en banc*) (same).

probable cause to believe that an individual has committed a criminal offense, a custodial *arrest* – even one effected in violation of state arrest procedures – does not violate the Fourth Amendment." *Id.* at 71 (emphasis added).[4] There is no conflict between that holding on the constitutionality of an arrest and the decision in this case on the constitutionality of a search.[5]

2. Even setting aside the fact that none of the cases petitioner relies upon grapple directly with the scope of the search incident to arrest exception or the arguments made in this case, the precedents cited by petitioner are inapposite for an additional and distinct reason: none considers whether the search incident to arrest exception extends to searches incident to an arrest for a *citation-only* offense in the aftermath of this Court's relatively recent decision in *Knowles*.

The decision below was grounded upon, and limited by, the special status of citation-only offenses after *Knowles*. The Virginia Supreme Court did *not* hold that a warrantless search incident to arrest is unconstitutional whenever the arrest violates some requirement of state law, no matter how technical or trivial. To the contrary, the court limited its holding to cases in which officers search a suspect after arresting him for an offense that state law has deemed so minor that the serious invasion of privacy entailed by an arrest cannot be allowed. *See* Pet. App. 11. And it reached

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[4] Even this conclusion was ultimately unnecessary to the disposition of the case – the court eventually concluded that the arrest was consistent with state law in any event. *Id.* at 72.

[5] For the same reason, there is no relevant conflict between the California Supreme Court's decision on the constitutionality of arrests in *McKay* and the Ninth Circuit's ruling on the constitutionality of a search incident to an illegal arrest for a citation-only offense in *United States v. Mota*, 982 F.2d 1384 (9th Cir. 1993). *Contra* Pet. 13.

that conclusion based on its reading of this Court's decision in *Knowles*, which likewise focused on the proper application of the search incident to arrest exception in the context of citation-only offenses. *See id.*; *Knowles*, 525 U.S. at 116-19.

Accordingly, in order to demonstrate an on-point division of authority potentially worthy of this Court's intervention, petitioner must show that the lower courts are divided on the application of the search incident to arrest exception to citation-only offenses in the aftermath of *Knowles*. This, petitioner cannot do. To begin with, only three of the cases cited by petitioner were decided after this Court's decision in *Knowles*, and two of those decisions do not even cite what the Virginia Supreme Court found to be the principal authority for its decision.[6] It is far too early to say whether any current conflict in the lower courts will persist once courts have the opportunity to consider the specific question presented in this case in light of this Court's most recent on-point pronouncement.

Even setting *Knowles* to one side, the vast majority of petitioner's cases do not involve a citation-only offense. Instead, most of the cases involve serious crimes that were properly subject to arrest, except that the officers failed to observe various technical state law requirements for effecting the arrest: *e.g.*, the defendant was properly subject to arrest but the particular arresting officer was acting outside of his or her jurisdiction; the arrest warrant was procedurally defective; officers did not have a warrant that was required by state law but not by the Fourth Amendment; or the officers could not

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[6] *See McKay*, 41 P.3d at 68 n.6 (noting *Knowles* in passing); *Knight*, 300 F.3d at 1272 (not citing *Knowles*); *Hamilton*, 638 N.W.2d at 95-97 (same).

satisfy a heightened probable cause standard imposed by state (but not federal) law.[7]

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[7] **1st Cir.**: *Vargas-Badillo*, 114 F.3d at 6 (arrest for drunk driving violated state law warrant requirement for misdemeanors not committed in officer's presence);

3d Cir.: *Anderson*, 341 F.3d at 498 (arrest for firing shotgun in residential neighborhood while intoxicated was invalid for some unspecified state law reason).

4th Cir.: *Van Metre*, 150 F.3d at 347 (arrest on out-of-state arrest warrant violated state law requiring local "fugitive from justice" warrant).

5th Cir.: *Walker*, 960 F.2d at 415 (arrest on drug distribution charges alleged to be "unlawful under Texas law" for some unspecified reason);

6th Cir.: *Wright*, 16 F.3d at 1433 & n.2 (arrest for drug conspiracy violated state law imposing stricter probable cause standard than the Fourth Amendment for warrantless arrests based on informant's tips);

7th Cir.: *Gordon*, 29 F.3d at 297 (arrest warrant for criminal trespass was issued in violation of state law requiring prior opportunity for hearing in cases involving ownership disputes);

10th Cir.: *Miller*, 452 F.3d at 733 (arrest apparently for illegal firearm discharge within city limits alleged be in violation state law requiring warrant to stop vehicle for misdemeanor not committed in officer's presence);

11th Cir.: *Knight*, 300 F.3d at 1272 (arrest for making death threats alleged to have violated state law requiring warrant for misdemeanors not committed in an officer's presence);

Colorado: *Hamilton*, 666 P.2d at 154 (Colo. 1983) (arrest for breaking into a bank invalid because made outside officers' territorial jurisdiction)

Massachusetts: *Lyons*, 492 N.E.2d at 1145 (indecent exposure arrest asserted to be involved because officers violated law requiring defendant be given notice and hearing before warrant for a misdemeanor may properly issue).

Michigan: *Hamilton*, 638 N.W.2d at 95 (drunk driver arrested outside officers' territorial jurisdiction);

North Carolina: *Eubanks*, 196 S.E.2d 706 (N.C. 1973) (same)

In fact, of the fifteen cases cited by petitioner, only *two* involve and consider the relevance of a citation-only offense: the Eleventh Circuit's pre-*Knowles* decision in *Knight v. Jacobson*, and the California Supreme Court's decision in *People v. McKay*. As noted above, *Knight* was a Section 1983 case challenging only the constitutionality of the arrest; it did not involve a search and, therefore, did not implicate *Knowles* and the search incident to arrest exception. *See* 300 F.3d at 1274. And while *McKay* was decided after *Knowles* and did involve a search, the California Supreme Court considered only whether the results of the search should be suppressed as the fruits of an unconstitutional arrest. *See McKay*, 41 P.3d at 64-72.[8]

Ohio: *Droste*, 697 N.E. 2d at 621-22 (drunk driving arrest by liquor control investigators lacking traffic law enforcement authority).

[8] The same was true in *United States v. Lewis*, 183 F.3d 791 (8th Cir. 1999), a post-*Knowles* case cited by petitioner's amici. There, the defendant argued only that the evidence obtained through the search should be suppressed as the fruit of an unconstitutional arrest. *See id.* at 793. He did not, as respondent did in this case, argue that the search was itself unconstitutional under *Knowles*. It is thus understandable that the Eighth Circuit did not cite or discuss *Knowles* in its opinion. Moreover, the current status of *Lewis* is not at all clear. Even at the time it was issued, two members of the *Lewis* panel expressed grave reservations about the court's holding but considered themselves bound by circuit precedent. *See id.* at 794-95 (Heaney, J., concurring) (finding panel bound by *United States v. Bell*, 54 F.3d 502 (8th Cir. 1995), but urging that *Bell* be reconsidered en banc); *id.* at 795-96 (Goldberg, J., concurring) (agreeing that *Bell* was binding, but concluding that the decision "ignore[d] important precedent" relevant to the question). In a future case, the court would be free to decide whether *Lewis* and *Bell* remain good law after this Court's more recent decision in *Knowles*. *See United States v. Pratt*, 355 F.3d 1119, 1124 n.3 (8th Cir. 2003) (noting that continuing validity of *Bell* is open to review in a proper case, but concluding that that question was not presented in the case before the panel).

Accordingly, there is no reason to believe that the courts relied upon by petitioner would have decided this case differently than did the Virginia Supreme Court, or that the Virginia Supreme Court would hold unconstitutional a search incident to a procedurally deficient arrest for a generally arrestable offense.

3. The foregoing also demonstrates that certiorari is unwarranted because the petition does not pose any question of recurring importance. Indeed, petitioner and its amici have only been able to find a handful of instances in the past forty years in which courts have been called upon to address searches incident to an arrest made for a citation-only offense, despite the fact that millions of arrests and prosecutions have occurred during that time. If the issue somehow becomes more prevalent in the future, this Court will have ample opportunity to take a future case in which the question arises. Further percolation is particularly desirable here, where only one court has fully considered the issue in light of this Court's decision in *Knowles*.

II. The Virginia Supreme Court Correctly Held That The Fourth Amendment Prohibits Officers From Searching An Individual Incident To An Unlawful Arrest For A Citation-Only Offense.

Certiorari is also unwarranted because the Virginia Supreme Court's decision is correct, respecting both this Court's decision in *Knowles* that the Fourth Amendment prohibits searches incident to arrests for citation-only offenses and the State's prerogative to forbid the substantial intrusion of an arrest and search upon its citizens in response to minor citation-only offenses. The rule proposed by petitioner, on the other hand, invites abuse, as local officers would have an incentive to ignore state limitations on their authority, knowing that that evidence seized in violation of state law may be used in state or (at the very least) federal court. At

the same time, prohibiting searches incident to unlawful arrests is consistent with long-held understandings of the proper balance of interests between citizens' privacy and legitimate law enforcement needs.

A. The Virginia Supreme Court Correctly Declined To Extend The Search Incident To Arrest Exception To Unlawful Arrests For Citation-Only Offenses.

This Court has long recognized an exception to the general Fourth Amendment prohibition against warrantless searches for a search incident to a *lawful* arrest. The Virginia Supreme Court did not err in concluding that, under this Court's decision in *Knowles*, the Fourth Amendment precludes a search incident to an *unlawful* arrest effected by an officer who only had authority to issue a summons or citation.

1. This Court's Prior Decisions Support The Virginia Supreme Court's Holding That An Unlawful Arrest Will Not Support A Constitutional Search Incident To That Arrest.

The suppression of evidence under the Fourth Amendment is, of course, governed by federal law. Neither respondent nor the Virginia Supreme Court has suggested otherwise. But all also agree that state law plays a substantial role in Fourth Amendment analysis – the state controls the circumstances under which a constitutional search may occur by, at the very least, defining the elements of a state criminal offense. *See* Pet. 21.[9] The question here is whether state law

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[9] Accordingly, petitioner's reliance (Pet. 15-16) on *Elkins v. United States*, 364 U.S. 206 (1960), and *California v. Greenwood*, 486 U.S. 35 (1988), is misplaced. While *Elkins* emphasized that federal law determines the suppression of evidence under the Fourth Amendment, 364 U.S. at 223-24, and *Greenwood* held that Fourth Amendment expectations

plays a concomitant role in determining the reasonableness of police conduct by delimiting the kinds of offenses for which warrantless searches may be conducted under the search incident to arrest exception. The Virginia Supreme Court rightly concluded that it does.

1. This Court has never held that the search incident to arrest doctrine permits a search whenever an officer arrests an individual regardless of the officer's legal authority to effect the arrest. To the contrary, in *Robinson*, this Court took care to state nine times that its holding applied only to searches incident to a "lawful" arrest. *E.g.*, 414 U.S. at 224 ("It is well settled that a search incident to a *lawful* arrest is a traditional exception to the warrant requirement of the Fourth Amendment.") (emphasis added); *id.* at 235 ("It is the fact of the *lawful* arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is ... a 'reasonable' search under that Amendment.") (emphasis added).

This careful language was no accident. It reflects the long-established constitutional understanding of the search incident to arrest exception. *See, e.g.*, *Preston v. United States*, 376 U.S. 364, 367 (1964) ("Unquestionably, when a person is *lawfully* arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused . . . .") (emphasis added); *Harris v. United States*, 331 U.S. 145, 151 (1947) ("Search and seizure incident to *lawful* arrest is a practice of ancient origin . . . .") (emphasis added); *Agnello v. United States*, 269 U.S. 20, 29 (1925) ("The right without a search warrant contemporaneously to search persons *lawfully* arrested . . . is

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of privacy are not affected by state law protections, 486 U.S. at 43, neither addressed the question at issue here or held that state law is irrelevant across the board.

not to be doubted.") (emphasis added); *Weeks v. United States*, 232 U.S. 383, 392 (1914) (stating that the right "to search the person of the accused when *legally* arrested . . . has been uniformly maintained in many cases") (emphasis added).

There is no basis for petitioner's apparent view that by "lawful" arrests, this Court merely meant arrests that comply with the probable cause requirement of the Fourth Amendment even if the arrest is otherwise unauthorized. Indeed, this Court's decision in *Michigan v. DeFillipo*, 443 U.S. 31 (1979), makes clear that the opposite is true. In *DeFillipo*, the defendant was arrested for violating an ordinance that was later declared unconstitutional. A search incident to that arrest revealed that the defendant was in possession of controlled substances, and he was charged with drug possession. *Id.* at 33-34. In deciding whether the drug evidence should have been suppressed, this Court applied the established rule that "an arresting officer may, without a warrant, search a person *validly* arrested." *Id.* at 35 (emphasis added). In determining whether a valid arrest had occurred, this Court focused on both the state law authorization for the arrest and on whether the arrest otherwise violated the Fourth Amendment. The Court began by holding that "[w]hether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law." *Id.* at 36. In *DeFillipo*, the question required little analysis because the defendant did "not contend . . . that the arrest was not authorized by Michigan law," pursuant to the State's general arrest statute. *See id.* at 36, 40. The Court next concluded that an arrest based on probable cause to believe that a suspect had violated a not-yet-invalidated ordinance did not independently violate the Fourth Amendment. *Id.* at 36-38. Having concluded that the arrest was authorized by state law and did not otherwise violate the Fourth Amendment, the Court held that "the

search which followed was valid because it was incidental to that arrest." *Id* at 40.[10]

The analysis in *DeFillipo* was consistent with this Court's prior decision in *United States v. Di Re*, 332 U.S. 581 (1948). In that case, the defendant was arrested by local law enforcement officers, working with a federal investigator, for possessing counterfeit gasoline ration coupons. 332 U.S. at 582. In his federal prosecution, the defendant moved to suppress the evidence of the coupons because they were "obtained in violation of the Fourth Amendment." *United States v. Di Re*, 159 F.2d 818, 818 (2d Cir. 1947). The Second Circuit agreed, finding that the arrest was in violation of state law and that the search was therefore unconstitutional: "If the prosecution of crime is to be conducted with so little regard for that protection which centuries of English law have given to the individual, we are indeed at the dawn of a new era; and much that we have deemed vital to our liberties, is a delusion." *Id.* at 820. In this Court, the Government defended the search as falling within the search incident to arrest exception to the Fourth Amendment's warrant requirement. *See* 332 U.S. at 583-84. Applying the settled requirement that the search be incident to

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[10] Petitioner misconstrues the Court's holding as implying that state law is constitutionally relevant only to the extent that it "defines the crime for which the officer must have probable cause." Pet. 23. While it is obviously true that state law definitions of crimes are critical to the probable cause inquiry, nothing in the Court's statements in *DeFillipo* implies that this is the only way in which state law affects the Fourth Amendment analysis. Indeed, if, as petitioner argues, the constitutionality of a search incident to arrest depends in no way on the officer's state law authority to effect a custodial arrest, there would have been no reason for the Court's discussion of the state law authorization for the arrest in *DeFillipo*. *See* 433 U.S. at 39. Nor would the Court have taken such care to make clear that the general arrest statute authorizing the arrest was constitutional, even if the substantive ordinance was not. *See id.*

a *lawful* arrest, this Court explained that if the defendant "was lawfully arrested, it is not questioned that the ensuing search was permissible." 332 U.S. at 587. "Hence we must examine the circumstances and the law of arrest." *Id.* The Court rejected the Government's invitation to craft a federal common law governing arrest for federal crimes. Instead, the Court held that "in the absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity." *Id.* at 589. Finding that the arrest in the case before it did not comply with local law, this Court held that the arrest was unlawful and, accordingly, declined to apply the search incident to arrest doctrine. *Id.* at 588-95.

As in this case, the arrest in *Di Re* was unauthorized under state law and, as in this case, the lower court properly concluded that the search incident to arrest doctrine did not extend to a search incident to such an unlawful arrest. Petitioner attempts to distinguish *Di Re* on the ground that the Court adopted local law to provide the federal arrest rule as a matter of its "supervisory power[s]," not as a matter of Fourth Amendment law. Pet. 23. This argument is partially correct, but it misses the point because it conflates two different holdings in *Di Re*. The first holding established that state law determines the validity of the arrest for purposes of the federal prosecution. See 332 U.S. at 591. This holding was undoubtedly an exercise of the Court's supervisory authority. But the Court's second holding was constitutional: it held that the Fourth Amendment prohibits warrantless searches incident to an unauthorized arrest. *See id.* at 595. The evidence was excluded in *Di Re* because the search violated this *constitutional* principle. *Id.*

Petitioner cannot plausibly maintain that *Di Re*'s second holding was also an exercise of the Court's supervisory authority. This Court has been reluctant to use its supervisory

power to order suppression of evidence for conduct that does not violate the defendant's Fourth Amendment rights. *See generally*, *United States v. Payner*, 447 U.S. 727, 733-36 (1980); *see also* Pet. 20. It would thus be quite surprising had this Court in *Di Re*, without discussion, exercised its supervisory power to order suppression of the evidence if no constitutional principle were at stake. The Court's language also belies such a reading: In suppressing the evidence in *Di Re*, the Court explained the result as flowing from the way in which "the forefathers, after consulting the lessons of history, designed our Constitution." 332 U.S. at 595. If any doubt about the constitutional basis of *Di Re* remained, that ambiguity was removed in *Johnson v. United States*, 333 U.S. 10 (1948), where this Court applied *Di Re* to the suppression of evidence found in a search incident to an arrest in violation of state law on unambiguously constitutional grounds. *See* 333 U.S. at 13 (quoting Fourth Amendment as establishing rule governing the case); *id.* at 15 & n.5 (rejecting Government's assertion that search was constitutional under search incident to arrest exception because arrest was in violation of state law). Accordingly, while the rules governing the lawfulness of the arrest may have been developed by this Court in the exercise of its supervisory powers, the constitutional principle enforced in *Di Re* – precluding searches incident to unauthorized arrests – arises from the Fourth Amendment and remains applicable today.

2. Beyond enforcing this Court's established requirement that a warrantless search be preceded by a lawful arrest, the Virginia Supreme Court's decision in this case flows naturally from this Court's decision in *Knowles*. In *Knowles*, this Court rejected the view that the issuance of a citation justified dispensing with the Fourth Amendment's traditional requirement of a warrant to authorize the search of an individual. Accordingly, there is no question that the

officers in this case would have been constitutionally forbidden from searching respondent if they had complied with the state law precluding his arrest and had simply issued him the summons authorized by state law. It makes little sense to read the Fourth Amendment as forbidding a search when officers act lawfully but permitting the same search when officers exceed the lawful limits on their arrest authority.

Indeed, allowing such searches would create a substantial incentive for officers to effect unlawful arrests for a citation-only offense when they have a hunch, short of probable cause, that a search would turn up evidence of a more serious crime. Officers could arrest the suspect in violation of state law, conduct a search, then release him if no evidence of another crime is discovered. To be sure, the officer might face the theoretical prospect of punishment (if the citizen complained) or civil liability under state law (if state law provided a cause of action and if the citizen thought that the prospect of a *de minimis* damages award was worth the hassle and expense of litigation). But petitioner identifies no instance in which such an alternative deterrent to the exclusionary rule has been employed, and inevitably the net effect of petitioner's interpretation of the Fourth Amendment would be to provide officers with a roadmap for evading *Knowles*' prohibition against searches incident to citation.

3. The Virginia Supreme Court also rightly rejected petitioner's reliance on *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001). In that case, this Court held that the Fourth Amendment does not prohibit a state from authorizing arrest for misdemeanors subject only to a fine. *Id.* at 323, 354. As the Virginia Supreme Court recognized, this Court made a point in *Atwater* of making clear that the misdemeanor arrest at issue was plainly authorized by the state legislature. *See id.* at 323. Nor did *Atwater* involve any question regarding the

search incident to arrest doctrine. *See id.* at 326 (question presented limited to constitutionality of arrest).

Petitioner claims that federalism interests are better promoted by leaving to each state the decision whether to suppress evidence obtained through a search incident to an arrest in violation of state law. Pet. 19-20. The rule petitioner proposes, however, would not achieve that result. Given that state exclusionary rules do not apply in federal court, *see United States v. Eastland*, 989 F.2d 760, 766-67 (5th Cir. 1993) (citing cases), under petitioner's rule states wishing to prohibit the use of evidence found incident to an illegal arrest would be unable to do so when the evidence was turned over to federal authorities for use in a federal prosecution, a fairly common occurrence. Petitioner's constitutional rule thus would resurrect a version of the "silver platter doctrine" disavowed by this Court in *Elkins v. United States*, 364 U.S. 206, 208 (1960), allowing state officials to circumvent limitations on their own authority by unlawfully obtaining evidence for use in federal trials. The federal structure and respect for state sovereignty is better served by constitutional rules that reinforce, rather than work against, the balance struck by the people's state representatives between the legitimate needs of law enforcement and the important privacy rights of its citizens.[11]

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[11] The Virginia state legislature remains free to effectively overrule the decision in this case by authorizing arrests for minor offenses like driving with a suspended license. In fact, legislation to do just that was proposed in, and rejected by, the Virginia General Assembly earlier this year. *See* HB 2943, 2007 Gen. Assem. Reg. Sess. (Va. 2007).

2. *Forbidding Searches Incident To Unlawful Arrests Is Consistent With The Common Law Tradition That Informs The Proper Interpretation Of The Fourth Amendment.*

Limiting the search incident to arrest exception to cases of authorized arrests is also consistent with the common law tradition that gave rise both to the exception and to its limitation to "lawful arrests." *See Wyoming v. Houghton*, 526 U.S. 295, 299 (1999) ("In determining whether a particular governmental action violates [the Fourth Amendment], we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed."). Petitioner has not identified any common law tradition allowing searches incident to unlawful arrests for offenses not subject to arrest under local law. Indeed, the tradition is understandably to the contrary. In an opinion relied upon by this Court in *Robinson*, 414 U.S. at 232, then-Judge Cardozo explained the "basic principle" of the common law thus: "Search of a person is unlawful when the seizure of the body is a trespass, and the purpose of the search is to discover grounds yet unknown for arrest or accusation." *People v. Chiagles*, 237 N.Y. 193, 197 (1923) (citing *Entrick v. Carrington*, 19 Howell's State Trials 1030). At common law, an officer's unauthorized or unjustified arrest of a citizen constituted a trespass.[12] Accordingly, the

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[12] *See Payton v. New York*, 445 U.S. 573, 592 (1980) ("At common law, the question whether an arrest was authorized typically arose in civil damages actions for trespass or false arrest, in which a constable's authority to make the arrest was a defense."); William Lloyd Prosser, PROSSER ON TORTS § 12, at 54 (3d ed. 1964) (noting that common-law actions for false arrest or false imprisonment are a "lineal descendent of the old action of trespass"); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 624 (1999) ("[A]t common

search of a person seized in excess of an arresting officer's authority was unlawful as well. *See People v. DeFore*, 150 N.E. 585, 586 (N.Y. 1926) (holding that "[t]he search was unreasonable in the light of common law traditions" because the underlying arrest was not authorized by state law, and thus "[t]here was no lawful arrest to which the search could be an incident"). Limiting the search incident to arrest exception to arrests authorized by state law comports with this common-law background.

3. Traditional Standards Of Reasonableness Do Not Support Allowing Officers To Search Without A Warrant Those Whom They May Not Legally Arrest.

The Virginia Supreme Court's decision is furthermore consistent with "traditional standards of reasonableness," which take into account "on the one hand, the degree to which [the search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Houghton*, 526 U.S. at 300. Under these standards, it is unreasonable to conduct a search incident to an arrest for a state law offense for which the state prohibits arrest, because such an intrusion on individual privacy cannot be justified by the government's interests.

The costs to individual privacy of the search at issue here are serious and uncontested. "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891). State

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law, a search or arrest was presumed an unlawful trespass unless 'justified.'").

legislatures consciously make certain minor violations of state law subject only to citation precisely because of the common understanding that such violations are insufficiently serious to warrant such an intrusion. Limitations on arrest also recognize that minor violations are sufficiently common that authorizing officers to arrest for such offenses (*e.g.*, speeding, driving without a license, illegal parking, etc.) would risk a massive intrusion into the privacy of citizens. Balancing individual and governmental interests is quintessentially a legislative function, and the Virginia legislature has struck the balance in favor of freedom from arrest for such minor violations.

At the same time, the very fact that the State has prohibited arrests for minor offenses illustrates the Legislature's considered determination that arrests and searches for such minor violations are unnecessary to further any important state interest. While individual law enforcement officers may be interested in evading that limitation on their authority, that interest plainly does not constitute a "legitimate government interest" that must be taken into account in the Fourth Amendment analysis. Nor does the rule advanced by petitioner promote any legitimate interest in "preserv[ing] evidence on [the suspect's] person for later use at trial." *Robinson*, 414 U.S. at 234. As the Court recognized in *Knowles*, the government's interest in gathering evidence relating to a citation-only offense is *de minimis*: after the stop the police would have "all the evidence necessary to prosecute that offense." 525 U.S. at 118. Here, for example, there is no reason to think that a search of respondent's person or vehicle would have yielded any further evidence relating to his driving with a suspended license.

While the government interest in officer safety is "both legitimate and weighty," *Knowles*, 525 U.S. at 117, in the

context of citation-only offenses, it is insufficient to justify the intrusion on citizen privacy and the risk of manipulation to evade the limits imposed by state law and *Knowles*. Even petitioner does not go so far as to assert that the Fourth Amendment permits a search incident to *every* arrest. At the very least, petitioner must acknowledge that a search incident to an *unconstitutional* arrest violates the Fourth Amendment, even though an unconstitutional arrest poses no less danger to officers than an arrest for a citation-only offense. Likewise, even the act of issuing a citation carries some degree of risk, and may provoke a confrontation. Nonetheless, this Court in *Knowles* found that this risk was insufficient to justify permitting warrantless searches in such circumstances. 525 U.S. at 117-18. At the same time, what risk remains can be managed in other ways: an officer can order both driver and passenger out of the car, perform patdown searches upon reasonable suspicion that they may be armed or dangerous, and conduct a patdown of the interior of the vehicle upon reasonable suspicion that an occupant is dangerous. *See Knowles*, 525 U.S. at 117-18.[13]

The rule adopted here is also reasonable in light of the important practical interest in developing constitutional rules that are simple and easy to administer. *See Atwater*, 532 U.S. at 347. The Virginia Supreme Court's rule requires nothing more of officers than what is already required of them under local law: they must obey the limits on their arrest authority imposed by the state legislature. And, of course, state courts are already intimately familiar with enforcing those

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[13] If the unlawful arrest persists to the point where the individual is booked and placed in a jail cell, there would be a separate question whether the government's interests would permit a search prior to introducing the suspect into the jail population. Such a question is not implicated here because the search took place well before respondent was taken to the police station.

limitations. Petitioner complains that some of these rules are complex and difficult to administer. Pet. 16-17. For instance, petitioner cites Va. Code § 19.2-250, which establishes jurisdictional boundaries beyond which officers may not arrest a suspect. Pet. 17. This objection fails on two levels. First, officers are already required to know and adhere to these requirements of state law upon pain of discipline and potential liability for false imprisonment. It is thus unsurprising that petitioner is unable to marshal any evidence that local officers routinely violate the state law limitations on their arrest authority, as they would if the laws were as byzantine as petitioner alleges.

Second, as discussed above, the Virginia Supreme Court did not forbid searches incident to arrests that fail to comply with such procedural limitations; the court held only that the Fourth Amendment prohibits searches incident to arrests for offenses that are categorically not subject to arrest by any officer. Mere mistakes of form or procedure do not implicate constitutional questions, and Virginia so recognizes.[14] This case, however, presents a different issue: whether officers who make a custodial arrest in contradiction, indeed defiance, of state law that categorically prohibits the defendant's arrest may successfully claim that their search is lawful because it was incident to such an arrest. Petitioner cannot reasonably argue that it is too much to expect police officers to comply

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[14] For example, *Janis v. Commonwealth*, 472 S.E.2d 649, *aff'd en banc* 479 S.E.2d 534 (Va. App. 1996), held that suppression was not a remedy for violating a statutory requirements for establishing probable cause in an affidavit. *See also Troncoso v. Commonwealth*, 407 S.E.2d 349, 350 (Va. App. 1991) ("Historically, searches or seizures made contrary to provisions contained in a Virginia statute provide no right of suppression unless the statute supplies that right.") (citation omitted).

with such clear and categorical limits on their arrest authority.[15]

B. In Addition, The Arrest In This Case Was Unconstitutional Because The Officers Lacked Probable Cause To Believe Respondent Committed An Arrestable Offense.

In the alternative, suppression was proper here because the respondent's arrest violated the Fourth Amendment.

The Fourth Amendment requires probable cause to believe that the suspect has committed an *arrestable* offense, not simply that the suspect has committed an act in violation of state criminal law. While this Court has held that an arrest is generally reasonable if based on probable cause, it has never held that an arrest is constitutionally reasonable for *every* violation of state law – *i.e.*, without regard to whether state law allows arrest for that conduct. For instance, a police officer cannot arrest an individual who violates state law in a way that gives rise only to a civil infraction or a tort. Instead, the validity of an arrest under the Fourth Amendment depends upon whether state law considers the offense sufficiently serious to warrant invocation of the criminal justice system, including the possibility of arrest and search. The question here is whether the state legislature's role in the constitutional analysis is limited to deciding whether an offense should be treated as criminal or civil, or whether the constitutional analysis also defers to the state legislature's judgment that

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[15] This case does not involve an objectively reasonable mistake regarding the scope of an officer's arrest authority. *Cf. Illinois v. Rodriguez*, 497 U.S. 177 (1990) (search based on reasonable but mistaken belief that individual consenting to search of house had authority to give that consent did not violate Fourth Amendment). An officer conducting a search based on a reasonable but incorrect belief that the arrest was authorized would plainly be entitled to qualified immunity from any civil liability. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

some violations, although technically classified as criminal, do not warrant invocation of the full panoply of criminal enforcement mechanisms, including the power of arrest.

This Court's short-hand description of the Fourth Amendment's "probable cause" requirement, relied upon by petitioner, does not resolve that question. While the Court has sometimes said that "a warrantless arrest by a law enforcement officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed," *Devenpeck v. Alford*, 543 U.S. 146 (2004), it has always done so in the context of cases in which a state law allowed arrest for the offense at issue. In *Atwater*, for example, this Court took care to note that the misdemeanor arrest in that case was authorized by state law. 532 U.S. at 323. In other cases, state law authority to effect an arrest has been obvious and, apparently, undisputed.[16] Accordingly, this Court has never held – or even so much as suggested – that the Fourth Amendment allows officers to arrest anyone who they have probable cause to believe has committed a crime, regardless of whether the law creating that crime allows arrests for committing it.

The "ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Brigham City v. Stuart*, 126 S. Ct. 1943, 1947 (2006). An arrest based on nothing more than probable cause to believe that the suspect has committed a non-arrestable offense is just as unreasonable as an arrest based on probable cause to believe that the defendant has committed a civil tort. Petitioner can show no common law tradition

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[16] *See Devenpeck v. Alford*, 543 U.S 146 (2004) (impersonating a police officer); *Texas v. Brown*, 460 U.S. 730 (1983) (possessing heroin); *United States v. Watson*, 423 U.S. 411 (1976) (possessing stolen mail); *Brinegar v. United States*, 338 U.S. 160 (1949) (violating the Liquor Enforcement Act of 1936).

permitting arrests for offenses not subject to arrest under state law. Officers have no legitimate interest in arresting citizens for offenses the state legislature has determined insufficiently serious to warrant deprivation of the citizen's liberty, whether the offense violates civil law or constitutes a citation-only criminal offense. Finally, as discussed above, prohibiting arrests (and attendant searches) that are already forbidden by state law provides an understandable and easily administered rule for officers in the field as well as courts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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